

**WACO, Inc. and International Brotherhood of
Electrical Workers, Local 307. Case 5-CA-
22489**

January 23, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND
TRUESDALE

On December 23, 1992, Administrative Law Judge Peter E. Donnelly issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief.

On April 13, 1993, the National Labor Relations Board remanded the proceeding to the judge for further consideration in light of *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Town & Country Electric*, 309 NLRB 1250 (1992).

On July 1, 1993, the judge issued the attached supplemental decision. The General Counsel and the Charging Party filed exceptions; the General Counsel filed a supporting brief, which the Charging Party adopted; and the Respondent filed a reply brief.

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the decisions in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge found, and we agree, that the General Counsel has failed to sustain his burden of showing that the Respondent refused to hire job applicants because of their union affiliation. The General Counsel has not adduced any evidence of antiunion animus on the part of the Respondent. Further, he has not, in our view, proved that the Respondent engaged in the type of "blatant disparity" in rejecting union-affiliated applicants that was found in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), on which the General Counsel relies. We find *Fluor Daniel* distinguishable. In contrast to the Respondent's selection of at least some applicants who either were union members or had worked for unionized employers in the past, all applicants hired by Fluor Daniel had weak or nonexistent union ties, while all 48 who displayed union affiliation were denied jobs. Moreover, the Board found that Fluor Daniel offered no credible evidence to explain why the rejected applicants were treated disparately and concluded that its reasons were pretextual. Here, the judge found that the alleged discriminatees lacked the 6 years' electrical experience in heavy construction or maintenance that was specified in the Respondent's job advertisements. He also credited the testimony of the Respondent's witnesses that prior electrical experience on the Mount Storm jobsite, other electrical unit "outage" experience, or recommendations by managers or supervisors at the jobsite were factors which characterized successful applicants who lacked the 6 years of relevant experience, but that none of the discriminatees' applications

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

disclosed that they possessed these qualifications, except as noted below. Accordingly, we adopt the judge's finding that no prima facie case of discrimination is established.

Contrary to the judge, we find that union applicant Earl Kline's application showed a total of less than 6 years of relevant electrical experience. Also, although union applicant Albert Baker referred to Mount Storm outage experience in a section of the Respondent's application eliciting "additional information," Baker did not set forth any facts relating to that experience on the more specific question on the application asking him to list previous jobs.

In view of the Board's conclusion that the General Counsel failed to establish a prima facie case of discrimination, and in light of the absence of Respondent exceptions, Member Cohen finds it unnecessary to decide whether the applicants involved were statutory employees.

James P. Lewis, Esq., for the General Counsel.

Paul M. Thompson, Esq. and *Marguerite R. Ruby, Esq.*, of Richmond, Virginia, for the Respondent.

Brian Malloy, of Cumberland, Maryland, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. The charge herein was filed on January 22, 1992, by International Brotherhood of Electrical Workers, Local 307 (Union or Charging Party) alleging that WACO, Inc. (Employer or Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to hire eight electricians because of their membership in the Union. A complaint thereon issued on March 6, 1992.¹ An answer thereto was timely filed by Respondent. Pursuant to notice, a hearing was held before the administrative law judge on September 2-4, 1992, in Cumberland, Maryland. Briefs have been timely filed by General Counsel and Respondent, which have been duly considered.

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

Employer is a Virginia corporation with a jobsite at the Virginia Electric and Power Co. (VEPCO) facility at Mount Storm, West Virginia, where it is engaged in providing maintenance services. During the preceding 12-month representative period, Respondent, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to public utilities located outside the State of Virginia and during that same period of time, in the course and conduct of those business operations, provided services valued in excess of \$50,000 to public utilities located within the State of Virginia, including VEPCO. The complaint alleges, the answer admits, and I find that the Employer is an em-

¹ The eight union members named in the complaint were Mark Bailey, Terry Bailey, Albert Baker, Earl Kline, George Koontz, Shawn Lester, Theodore Lych, and James Sweitzer. For whatever reason, no charge was filed on behalf of John Corbin, a paid union organizer, who also applied.

ployer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. Facts

VEPCO maintains and operates a power generating station at Mount Storm, West Virginia. WACO, a nonunion Employer, contracted with VEPCO for the performance of craft support services throughout the power station. Pursuant to this function, WACO hired various craft employees, i.e., electricians, welders, carpenters, mechanics, and laborers for varying periods of time. Periodically, during these years, on an annual or semiannual basis, it was necessary for WACO to shut down and overhaul one of the three energy producing units at Mount Storm. This was done on an expedited continuing basis for about 40 days, working 8-hour shifts around the clock, with a greatly increased craft WACO work force until the job was completed. These projects were called "outages."² From 1986 through 1990, WACO lost the VEPCO contract, but, in 1991,³ it once again reacquired the contract, including outages. It was the outage scheduled for mid-September 1991, the first under WACO's reacquired contract, that gave rise to the matters treated herein.

The Union represents electricians under contract with various employers in a geographical area covering three counties in Maryland and five counties in West Virginia. The Union's business manager, Brian Malloy, is primarily responsible for the Union's operations. In January 1991, Malloy hired Corbin, a union member electrician, as an organizer. Corbin was paid a guaranteed 40 hours per week at \$17.45 per hour, 24 cents per mile, plus \$40 a week as expense money. Corbin understood that his principal responsibility would be to organize unorganized electrical contractors within the Union's geographical jurisdiction.

In August 1991, WACO began to hire craft employees, including electricians, at Mount Storm under its contract with VEPCO for the outage scheduled to begin in mid-September. On August 4 and 5, classified ads were placed in various local newspapers reading as follows:

ELECTRICIANS

Waco, Inc. Is Accepting Applications For Electricians With A Minimum Of 6 Years Experience In Heavy Construction Or Maintenance. Must Have Transportation, Birth Certificate Or Original Social Security Card And Driver's License. Must Pass Drug Screening Test. Applications Will Be Accepted Wednesday, August 7, 1991 At The Mt. Storm WV Fire Station On Rt. 50.

²Up to 1000 temporary craft employees were hired by WACO to work the outages.

³All dates refer to 1991 unless otherwise indicated.

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In an effort to organize the WACO electricians, Corbin solicited eight union members to respond to the ads and apply for outage employment with WACO at the Mount Storm facility. Under normal circumstances, any union member soliciting and accepting employment with a nonunion contractor would have been subject to internal union charges,⁴ but a "Job Salting Resolution" adopted by the union membership on March 19, 1987, excepted these applicants from those sanctions. That resolution reads:

JOB SALTING ORGANIZING RESOLUTION

WHEREAS: Local Union #307 is committed to organizing all unorganized craftsmen working in our jurisdiction, and;

WHEREAS: A continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool, and;

WHEREAS: The first obligation of the members of the local union is to organize the unorganized in order to maintain and secure our wages, benefits and other conditions of employment, and;

WHEREAS: The success of any organizing drive depends upon the support of each and every union craftsman, both off and on the job; therefore, be it

RESOLVED: That the Business Manager be empowered to authorize members to seek employment by nonsignatory contractors for the purpose of organizing the unorganized, and be it further

RESOLVED: That unemployed members shall report to the Business Manager for the purpose of assigning as needed in the organizing program, and be it further

RESOLVED: That the Business Manager shall maintain records of all members authorized to seek employment by nonsignatory employees including date(s) of authorization, date(s) of employment, and all other pertinent information, and be it further

RESOLVED: That such members, when employed by nonsignatory employees, shall maintain their position(s) on the out-of-work list, and be it further

RESOLVED: That such members, when employed by nonsignatory employees, shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification, and be it further

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and By-laws.

The applicants all understood that they would be seeking employment under the protection and terms of the resolution and were subject to its terms. Corbin testified that his organizing instructions at WACO would come from Malloy. Each of the job applicants at WACO were provided by Malloy with a letter of recommendation from Malloy dated August 7 to be attached to each job application. The letter read:

⁴The relevant sanctions are set out in the International constitution in art. XXVI, sec. 1(6), and in the union bylaws art. XVI, sec. 7.

This letter will attest to the fact that⁵ is a member of the IBEW Local Union #307, and has more than 6 years experience in the trade. He is a resident of this area and has been certified as a journeyman electrician by the Western Maryland Joint Apprenticeship [sic] Committee.

You will not be able to employ a more qualified and productive employee in any other labor market. Additionally, you can be assured that any protected activity in which this applicant may choose to engage following his employment by you will be conducted strictly within the guidelines established by the law and the National Labor Relations Board and will not interfere with his efficiency and productivity as an employee.

On August 7, armed with this letter of recommendation, eight union member electricians, plus Corbin, went to the Mount Storm, West Virginia fire station and submitted employment applications to which all appended the above letter of recommendation from Malloy. None of the nine were hired.

Kirk Hawk, senior technician aide for WACO at the Mount Storm facility, has been, since the early 1980s, responsible for the hiring of the craft support service employees, including electricians, needed for the outages, including the fall of 1991. With respect to the hiring process, Hawk testified that on or about August 1, he learned that pursuant to the contract with VEPCO, it would be necessary to employ some 225 employees for the outage, including 52 electricians, a number later reduced by VEPCO to 35. These numbers were specified by VEPCO under the contract.

As noted above, classified ads were placed in the local newspapers soliciting electrician applicants with 6 years' experience in heavy construction or maintenance.

Hawk testified that since 6 electricians were already working at the jobsite on another project, he would keep them to work during the outage so as to reduce the number of new hires to 29. Hawk then consulted a master list of about 250 or 300 craft employees previously employed by WACO for outages at Mount Storm, including about 50 electricians. Hawk testified that about 14 electricians were hired from this list before the classified ads were placed in the newspapers. This left about 15 electricians to be hired after August 7.

Hawk testified that he made the 35 selections based on various qualifying information and that union affiliation was not a factor in not hiring the union members who applied. Hawk testified and the record supports the testimony that 9 of the 35 hires did have some sort of union affiliation and that Hawk was aware of that when they were hired.

Hawk testified electrician job applicants needed 6 years of experience to qualify and that primary consideration for selection was prior powerplant experience, particularly the experience of employment during prior outages at Mount Storm. It appears that out of the 35 hired, some 21 had previously worked during outages at Mount Storm and about 6 had prior experience as coal mine electricians, which Hawk regarded as qualifying. The rest came to Hawk either by way of personal recommendations from someone known to Hawk, including VEPCO or WACO supervision, or were hired because of impressive resumes.

In reviewing the applications submitted after the ads were placed, including those submitted by the group from the Union, Hawk looked for a background of 6 years' experience, specifically the type of experience useful for outage work, such as prior outage experience or coal mine electrical work. The applications from the union members failed to show that type of work experience and did not list 6 years of experience in the applications despite the representations made in Malloy's letters of recommendation that each had that length of experience and were journeyman electricians.⁶

B. Discussion and Analysis

The protection of the Act against discrimination extends only to employee or job applicants within the meaning of Section 2(3) of the Act.⁷ Therefore, the threshold issue to be resolved is whether or not these union member job applicants could have become bona fide employees of the Respondent. In my opinion, this question is answered in the negative because the conditions of employment imposed by the Union under the terms of the Salting Resolution negate the possibility of any bona fide employer-employee relationship between the Respondent and the union member job applicants, specifically because it is the Union, not the employer and not the employee who has complete discretion to determine the duration of the employer-employee relationship. This creates circumstances under which the loyalty which would normally accrue to an employer is preempted by the Union.

A review of the Salting Resolution discloses that its only purpose is to organize unorganized electrical contractors. To achieve that result, as applied to the instant case, it resolves that Malloy, as business manager, is "empowered to authorize members to seek employment by nonsignatory contractors" and that unemployed members shall report to him to "assist as needed in the organizing program." Union members, once they are employed shall "promptly and diligently carry out their organizing assignments and leave the employer or job immediately upon notification [emphasis added]." Finally, it resolves that any member accepting non-union employment except as authorized by the Salting Resolution "shall be subject to charges and discipline as provided by our Constitution and Bylaws," referred to above. Corbin was hired as an organizer by Malloy to achieve the results targeted by this resolution.

This is more than simply retaining their union affiliation, as they were entitled to do, or to organize after being hired. See *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). This resolution gives the Union control over the employment status of WACO employees. In the instant case, under the terms of the Salting Resolution, it would have been possible for Malloy to have terminated the employment of all the electricians, at any other time, in his sole discretion. In these circumstances, where the Union retains control over the very existence of the employer-employee relationship, it would be a distortion

⁶ It is clear that neither Mark Bailey nor Shawn Leister had 6 years' experience as journeyman electrician and, in fact, were apprentices when they applied.

⁷ Job applicants are "employees" under Sec. 2(3) of the Act. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

⁵ The name of the job applicant was typed in at this space.

of the Act to concede that these individuals were "employees" of Respondent under Section 2(3) of the Act.⁸

With respect to the often discussed matter of divided loyalties, one may ask, where resides the loyalties of the union member applicants who, as union members, are retained by the Union on the out-of-work list while employed at WACO, and the Union is retaining the authority to terminate their employment? Clearly, under the terms of their employment, governed by the Salting Agreement, employees' loyalty is not divided since the Salting Agreement is essentially a "pledge of allegiance" to the Union, and employment was undertaken for the purpose of organizing the employer. It is difficult to envision much employer loyalty in the employer-employee relationship in circumstances where a third party, in this case the Union, has unfettered control over the duration of the employment, presumably even to the point where it could cause major damage to this Employer by terminating the employment of union member electricians in the middle of an outage.

In the paid union organizer cases, there is a split of authority. In *Willmar*,⁹ the Board, with the approval of the U.S. Court of Appeals for the District of Columbia Circuit, concluded that "Individuals who are full-time paid union organizers while applying for a job are protected Section 2(3) employees who cannot be discriminatorily denied employment simply on a basis of that union activity or status." In the *Zachry* case,¹⁰ the U.S. Court of Appeals for the Fifth Circuit, in denying enforcement of a Board Order, took a different view, deciding that a paid union organizer was not a bona fide job applicant and that the employer had a "right to reject a job applicant simultaneously paid and supervised by another employer." But, in the instant case, the issue is somewhat different since the electrician job applicants in issue were not being paid by both the Union and the Employer. There is no evidence to show that they would have been compensated by the Union. Nonetheless, the evidence, principally the Job Salting Resolution, does show that the real purpose for seeking employment was not to provide craft labor to the Employer but, rather, for the more limited purpose of organizing that Employer, evidenced by the fact that Malloy would decide how long those electricians worked. Clearly, under the Job Salting Resolution, that employment depended on organizational considerations, not the labor needs of the Employer.

In short, I conclude that where a union member job applicant's employment status may be terminated "immediately," by the union, based on organizational considerations, that job applicant is not a bona fide employee under Section 2(3) of

the Act, and this is true whether the applicant is a paid union organizer or simply a union member.

CONCLUSIONS OF LAW

Having concluded that the job applicants herein lack employee status, it follows that the Respondent did not violate the Act in failing to hire them, and that Respondent has not engaged in any conduct violative of the Act.¹¹

Respondent has not engaged in any conduct violative of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

ORDER

The complaint is dismissed in its entirety.

¹¹ In these circumstances, I find it unnecessary to decide whether or not Respondent failed to employ the job applicants based on discriminatory considerations in violation of Sec. 8(a)(3) of the Act.

¹² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

James P. Lewis, Esq., for the General Counsel.

Paul M. Thompson, Esq. and Marguerite R. Ruby, Esq., of Richmond, Virginia, for the Respondent.

Brian Malloy, of Cumberland, Maryland, for the Charging Party.

SUPPLEMENTAL DECISION

PETER E. DONNELLY, Administrative Law Judge. By Order dated April 13, 1993, the above-captioned case was remanded by the Board to me "for further consideration in light of *Sunland Construction Co.*, 309 NLRB 1224 (1992), and *Town & Country Electric*, 309 NLRB 1250 (1992)."

The Board, in those cases concluded that paid union organizers and union member job applicants were employees within the meaning of the Act and that the Employer violated Section 8(a)(3) of the Act by refusing to consider them for employment because of their union affiliation. The Board held, inter alia, that the legislative history of the Act reveals that the term "employee" should be interpreted "expansively" and "inclusively," so as to include paid union organizer job applicants. The fact that they are also simultaneously employed and paid by the union for the purpose of organizing their employer was no justification for refusing to hire them.¹

As the Board notes, these decisions were consistent with Board precedent affirmed by the Second, Third, and District of Columbia Circuit Courts of Appeals. See *NLRB v. Henlopen Mfg. Co.*, 599 F.2d 26, 30 (2d Cir. 1979) (dictum); *Escada (USA), Inc. v. NLRB*, 140 LRRM 2872 (3d Cir. 1992), enf. mem. 304 NLRB 845 (1991); *Willmar Electric Service v. NLRB*, 968 F.2d 1327 (D.C. Cir. 1992). The Board's position was rejected in two other circuit courts of appeal. See *NLRB v. Elias Bros. Big Day*, 327 F.2d 421, 427

⁸ This conclusion is consistent with Board precedent applying the common law "right of control" test in defining employee status under Sec. 2(3) of the Act in the following terms:

Under this test, an employer-employee relationship exists where the person for whom the services are performed reserves the right to control not only end to be achieved but also the means to be used in reaching such end.

Deaton Truck Lines, 143 NLRB 1372, 1377 (1963), enf. 337 F.2d 697, 698-699 (5th Cir. 1964); *Roane-Anderson Co.*, 95 NLRB 1501, 1503 (1953); *Operating Engineers Local 487 Health Fund*, 308 NLRB 805 (1992).

⁹ *Willmar Electric Service v. NLRB*, 303 NLRB 245 (1991), enf. 968 F.2d 1327 (D.C. Cir. 1992).

¹⁰ *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

¹ Obviously, and "a fortiori," union member applicants who are not paid organizers are also protected as "employees" under the Act.

(6th Cir. 1964); *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989).

In the instant case, eight union electricians and one paid union organizer (Corbin)² made application to WACO for jobs as electricians. The eight job applicants were all solicited by the Union and dispatched to Waco to apply for work. All were subject to the restrictions set out in the "Job Salting Resolution." In the original decision and for the reasons set out therein, I concluded that none of the applicants were bona fide employees within the meaning of Section 2(3) of the Act because of the fact that under the terms of the Job Salting Resolution, the Union retained the authority to determine the length of their employment, thus negating an essential concept of the employment relationship.

In *Town & Country*, Respondent introduced into evidence (R. Exh. 4(c)) a "Job Salting Resolution" identical to the Job Salting Resolution found in the instant case.³ It reads:

JOB SALTING ORGANIZING RESOLUTION

WHEREAS: Local Union #292 is committed to organizing all unorganized craftsmen working in our jurisdiction, and;

WHEREAS: A continual organizing program is the lifeblood of all building and construction trades unions because it is the only proven method of maintaining control of the construction labor pool, and;

WHEREAS: The first obligation of the members of the Local Union is to organize the unorganized in order to maintain and secure our wages, benefits and other conditions of employment, and;

WHEREAS: The success of any organizing drive depends upon the support of each and every union craftsmen, both on and off the job, therefore, be it

RESOLVED: That the Business Manager be empowered to authorize members to seek employment by non-signatory contractors for the purpose of organizing the unorganized, and be it further

RESOLVED: That unemployed members shall report to the Business Manager for the purpose of organizing the unorganized program, and be it further

RESOLVED: That the Business Manager shall maintain records of all members authorized to seek employment by nonsignatory employers including the date(s) of authorization, date(s) of employment, and all other pertinent information, and be it further

RESOLVED: That such members, when employed by nonsignatory employers shall maintain their position(s) on the out-of-work list, and be it further

RESOLVED: That such members, when employed by nonsignatory employers shall promptly and diligently carry out their organizing assignments, and leave the employer or job immediately upon notification, and be it further

RESOLVED: That any member accepting employment by a nonsignatory employer, except as authorized by

this RESOLUTION, shall be subject to charges and discipline as provided by our Constitution and By-laws.

In *Town & Country*, the Board, in reviewing the Respondent's exceptions to the administrative law judge's decision, alludes to the Job Salting Agreement, stating:

C. Exceptions

Based on the court's decision in *Zachry*, supra, the Respondent argues in its exceptions that the discriminatees were not bona fide applicants under the statute. The Respondent notes that Priem and Shafranski were full-time salaried business representatives and that the Union paid Hansen full journeyman's scale, in addition to the pay he received from Ameristaff, for the 31 hours that he worked at the Respondent's jobsite. The Respondent claims that the Union's payments to Hansen put him in the same category as full-time salaried business agents whom the court excluded from the definition of employee under Section 2(3). Regarding the rest of the alleged discriminatees, the Respondent argues that no violation occurred when it rejected their applications because, if they had been hired, the Union's "salting resolution" would have paid them the difference between the Respondent's wages and union scale and thus disqualified them under *Zachry*.

The Respondent also contends that the alleged discriminatees did not qualify as statutory employees because their first obligation under the salting resolution was to fulfill the Union's organizing purpose. The Respondent asserts that it was the Union which was the discriminatees' employer in the circumstances here. According to the Respondent, these Union members would work only for it under the Union's directions and, in the process, they would interfere with the self-determination rights of other employees. Further, because the salting resolution required members to leave the nonunion jobsite once organizing had ceased, the Respondent argues that none of the alleged discriminatees met the statutory definition of employee because they were not seeking permanent employment. Thus, for the above reasons, the Respondent urges the Board to find that the applicants for employment whom it rejected and Hansen were not employees under Section 2(3) of the Act.

Thereafter, the Board neither alluded to nor precisely addressed the impact of the Salting Resolution on its conclusions. However, with respect to the issue of permanence of employment, the Board, in commenting on *Oak Apparel*, 218 NLRB 701 (1975), states:

The Board in *Oak Apparel* rejected the argument that the discharged union organizers were not "employees" because they did not intend to remain in the respondent's employ beyond the period required for organization. The Board found it immaterial for purposes of Section 8(a)(3) whether the discharged organizers sought permanent employment with the Respondent. Permanency of employment, the Board held, was rel-

² As noted in the original decision, Corbin was not alleged in the complaint as a discriminatee.

³ Local 292, the local union in *Town & Country*, was, like Local 307, affiliated with the IBEW.

evant for election purposes, but was unrelated to the issue of "employee" status. *Id.* at 701, citing *Phelps Dodge Corp. v. NLRB*, supra, 313 U.S. at 192. *Dee Knitting Mills*, supra. To hold otherwise, concluded the Board, would result in employers discriminating "with impunity against temporary or casual employees who are not includable in any bargaining unit." *Id.* Since *Oak Apparel*, the Board consistently has held that paid union organizers are statutory employees entitled to the Act's protection. [Footnotes omitted.]

Later, in reexamining *Oak Apparel* and its progeny, the Board, in concluding that paid union organizers are employees, states:

Upon reexamination of our analysis of the scope of Section 2(3) in *Oak Apparel* and its progeny, we conclude that the definition of "employee" encompasses paid union organizers.

As more fully explained above, we rely on: . . . (3) the reasoning found in our own precedents, most recently approved by the District of Columbia Circuit in *Willmar Electric Service*, supra, that among other things, rejects the position that because the employment of paid union organizers if of limited duration they cannot be "employees."

The Board, however, did not address the precise issue, which is the basis of the original decision herein, i.e., whether or not job applicants subject to immediate termination of their employment by the local Union are nonetheless statutory employees. Nonetheless, since the Job Salting Resolution in the instant case is identical to the Job Salting Resolution in *Town & Country*, and since the Board had that Job Salting Resolution before it in *Town & Country*, I must assume that the full impact of it was considered by the Board in reaching its decision in *Town & Country*, and that the Board has decided that this employment restriction did not affect its conclusions.

Accordingly, since I am obliged to follow Board precedent, I now conclude that the matter has been resolved, and that all of the job applicants were bona fide employees under Section 2(3) of the Act.

Having thus concluded that the union member job applicants are employees, it is necessary next to ascertain whether or not the Respondent has discriminated against these applicants in refusing to employ them.

The General Counsel takes the position that all eight of the union electrician job applicants were rejected because of their union membership. Respondent contends that union affiliation was not a factor in failing to hire them and that valid business considerations were employed in making the selections for employment.

Clearly, Respondent was aware of the union membership of the eight applicants. However, in order for the General Counsel to prevail, it is necessary to establish that the applicants were rejected because of their union membership. In my opinion, the General Counsel has failed to sustain its burden in that regard.

To begin with, as set out the original decision, Respondent needed to employ 35 electricians for the upcoming "outage." At the time that the 8 union members made applica-

tion on August 7, some 15 electrician jobs remained to be filled.

Kirk Hawk, who was the Respondent's representative in the hiring process, testified that in hiring electricians, he was looking for those with prior experience during outages or a background including coal mine or powerhouse experience, since these were the type of skills best suited to the work being done during power plant outages, as contrasted with the residential or commercial electrical work. Except for James Sweitzer, none of the union electrician applicants appear to have had any background in that type of work.

With respect to the experience factor, the newspaper ads called for applicants with "6 Years Experience in Heavy Construction or Maintenance." Malloy's letters of recommendation represented that each applicant had "more than six years experience in the trade" and was a certified journeyman electrician. However, it appears that none of the union applicants listed 6 years of electrical experience of any type on the applications, with the exception of Earl Kline, showing slightly more than 6 years. Even though the record discloses that some of the union applicants had substantially more than 6 years of experience, their applications did not disclose that experience, and so in reviewing applications, Hawk would not have become aware of it.

Further, it appears that Mark Bailey and Shawn Leister were apprentices, not journeymen, and clearly lacked the requirements set out in the newspaper ads. Malloy, at the hearing, conceded that he did not check the applicants' work records to determine their qualifications and simply gave the same letter to each applicant without verifying the representations made in the letter. Hawk also testified that while some applicants without prior outage experience were hired, the basis for hire was legitimate. Hawk's un rebutted testimony was that James Goldizen, an electrical supervisor for the outage, recommended his brother, John Goldizen, among others, for employment. They were hired based on his recommendations. William La Rue, a VEPCO supervisor, also recommended several applicants who were hired.

Hawk and Bob Mortvedt, Respondent's project manager, both testified that all of the selections of craft employees for the outage were made without regard to union or nonunion considerations. In support of this position, Hawk testified, and the record supports the conclusion that approximately 9 of the 35 electricians hired for the outage had some sort of union affiliation, notably Paul Rodehaver, who was a member of Local 307, and that Hawk was aware of that before they were hired.

The General Counsel, while arguing that the failure to select those eight individual electricians named in the complaint was based on discriminatory considerations, has failed to adequately support that contention on the record. While a nonunion contractor's failure to hire union applicants is always suspect, the General Counsel is charged with proving the unfair labor practices alleged on the record, and I am not satisfied, based on this record, that the Respondent's refusal to hire these union electricians was discriminatory.

CONCLUSIONS OF LAW

1. The union electrician applicants named in the complaint are employees within the meaning of the Act.

2. The record herein is insufficient to support the conclusion that these applicants were discharged because of their union activity.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed in its entirety.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.